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Gendered Inequality:
Lesbians, Gays, and Feminist Legal Theory

Elvia R. Arriola†

I. INTRODUCTION

This article explores, from a feminist perspective, the questions of difference, equality, and sexual identity raised in discrimination claims by lesbians and gay men. Following the Supreme Court's decision in Bowers v. Hardwick,¹ which rejected the argument that the enforcement of sodomy statutes violates an individual's right to privacy,² progressive scholars

1 478 U.S. 186 (1986).
2 Until the Supreme Court decided Bowers v. Hardwick, lesbian and gay civil rights advocates principally relied on the "right to privacy" theory to question the power of the state to criminalize certain forms of sexual conduct practiced in the privacy of one's home. The privacy theory argues that one's sexuality is fundamentally important to a person's individuality and identity, while the state's interest in regulating sexuality is relatively insignificant. This theory is premised on the long-standing liberal democratic principle of the "right to be let alone" first articulated in Olmstead v. United States, 277 U.S. 438, 478 (1928).

The Bowers court found that the Georgia sodomy statute, used by a police officer to harass Michael Hardwick was constitutional. Justice White argued that homosexuality had a long history of punishment dating to English common law and the American colonial period. 478 U.S. at 192-93. See generally John d'Emilio & Estelle B. Freedman, Intimate Matters: A History of Sexuality in America 30-31 (1988) (discussing how the punishment of homosexuality in colonial America served both legal and moral purposes by regulating any form of sexual behavior unrelated to the reproductive needs of the commonwealth). In Bowers, Justice Blackmun severely criticized this historical argument, pronouncing it "revolting" and irrelevant to the constitutional question before the Court. 478 U.S. at 199 (Blackmun, J., dissenting).

Bowers did not reach the question of whether sodomy laws effectuate "cruel and unusual" punishment under the Eighth Amendment, or invidious discrimination under the Fourteenth Amendment Equal Protection Clause. See Janet E. Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity, 36 U.C.L.A. L. Rev. 915 (1989) (arguing that the question of homosexual identity is not simply an issue of the legitimacy of homosexual conduct, but rather grows out of a complex political discourse that is threatened in ways that the Carolene Products formulation prohibits by anti-homosexual discrimination); see also Elvia

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explored various arguments supporting the lesbian and gay community’s claim to equal rights under the law. In this search, scholars recognized that *Bowers* left the window open for an equality-based ruling. This window presents an opportunity to argue that, for some individuals, anti-gay prejudice strikes at the core of their personal identity. The toughest theoretical challenge in forging such an argument is to show that anti-gay prejudice is no different from any other form of invidious discrimination deemed inconsistent with the constitutional guarantee of equality before the law.

My inquiry into the questions of difference and identity, raised by the claim of equal rights for lesbians and gay men, is part of a broader effort to explore new ways of strengthening the law’s role in reducing the incidence of bias-related injustice and social violence which burden our culture today. This exploration, by necessity, includes an inquiry into arbitrary categorization and the reasons why some scholars argue for certain minority perspec-

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3 Gay rights advocates point out that about 10% of the American population is either lesbian or gay. That figure would be greater if one included individuals who self-identify as bisexual. Alfred Kinsey’s famous 1948 study of human sexual behavior remains the undisputed source of support for these figures. Dr. Kinsey discovered that at least 37% of males experienced some degree of homosexual contact between adolescence and old age; 10% were exclusively homosexual for at least three years between the ages of 16 and 55; and, 4% of white males were exclusively homosexual throughout their lives. Alfred C. Kinsey et al., Sexual Behavior in the Human Male 650-51 (1948).

4 Justice Blackmun noted the potential for a claim under either the Eighth, Ninth, or Fourteenth Amendments. 478 U.S. at 201 (Blackmun, J., dissenting). An equality-based claim would accuse the State of Georgia of selectively targeting only homosexuals, although the statute ostensibly prohibits all forms of sodomy.

5 In legal discourse, gay men and lesbian women are increasingly demanding that society and the courts recognize and protect individuals who view their intimate relationships with people of the same sex as central to their personal identity. However, some factions within this socially constructed sexual community fiercely resist broader characterizations. For example, some lesbians resent being grouped together with gay men. See, e.g., Ruthann Robson, Lesbian (Out)law: Survival Under the Rule of Law 21-22 (1992). See also Fighting Words: Gay, Lesbian Groups Seek to Expunge Bias They See in Language, WALL ST. J., May 3, 1993, at 1.

I use the term “gay people” to mean a community of women and men who identify as gay, lesbian, bisexual, or in any other way that does not conform to mainstream, majoritarian concepts of sexuality. I use this all-encompassing term to suggest that the conscious choice to love and live with other same-sex individuals is a sufficient (but not necessary) condition for arguing at law that a community of individuals experiences social discrimination solely based on their sexual identity. I do not intend by this term to negate the diversity of this gay and lesbian community.

Others view this conflict over “who we are and how we choose to be labeled” as critical to the process by which homosexuality is structured by a specific society under unique historical circumstances into an artifact, a subculture, or a closed community. See generally D’Emilio & Freedman, Intimate Matters, supra note 2; see also Joseph H. Hayes, Lesbians, Gay Men, and Their “Language,” in Gayspeak: Gay Male and Lesbian Communication 28-42 (James W. Chesbro ed., 1981); Jeffrey Weeks, Sexuality and Its Discontents: Meanings, Myths and Modern Sexualities 191-95 (1985). Finally, some argue that the dichotomy between biology and social construction (or nature/nurture) is a very narrow means for understanding homosexuality. See, e.g., John P. De Cecco & John P. Elia, A Critique and Synthesis of Biological Essentialism and Social Constructionist Views of Sexuality and Gender, 24:3/4 J. Homosexuality 1-26 (1993) (arguing that sexual and gender expression are produced by complementary biological, personal, and cultural influences).
tives in legal theory. I am concerned that certain assumptions made under established methods of discrimination analysis create limited scopes of reality in the adjudication process. New paradigms of analysis, which can flexibly meet the needs of particular social identities, are necessary to combat these limitations.

More generally, however, this call for new perspectives in discrimination analysis stems from a belief that the recent quest for diversity in legal theory and scholarship is part of a burgeoning American politics of sexual, ethnic, and racial identity that academics and judges cannot consciously ignore.

Although this article criticizes traditional models of discrimination analysis, I nevertheless see the law as a powerful instrument for cultural transformation. In this vein I encourage feminist, lesbian and gay, and traditional legal theorists to critically assess the impact of the governing paradigms.

This article demonstrates the ways in which significant flaws embedded in established methods of discrimination law and theory contribute to the failure of feminist and progressive scholars to craft adequate models of analysis in support of gay and lesbian victims of discrimination. This failure has induced some gay and lesbian scholars to charge that the American system of rule by law is an untrustworthy forum of justice for the lesbian, gay, or bisexual litigant.

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These charges have become part of a growing theoretical and political discourse about the inability of traditional methods of analysis to sufficiently address enduring patterns of prejudice. This discourse questions the ability of American courts to fulfill their role as guarantors of "equality under the law." From it emerged a growing call for splintered and diverse ways of handling the equal rights concerns of various social minorities. One such call has been voiced by lesbian legal theorists, who assert the need for relentlessly lesbian-centered perspectives. This appeal not only rejects traditional methods of analysis, but also ignores the value of feminist, gay male, or any other perspective which fails to recognize the heightened vulnerability of lesbian women.

This article argues that two of the traditional models for analyzing discrimination—the group-based or "discrete and insular" model, and the individual-regarding or "irrelevancy" model—prevent courts from capturing the full spectrum of prejudices which affect a person whose identity does not easily fit any single, traditional category of analysis. These frameworks falsely break down—and typically obscure—the various sources of prejudice targeting individuals who identify with multiple social communities or identities. In so doing, these traditional frameworks ignore the social reality of litigants filing discrimination claims. By disallowing more complex forms of discrimination, the law denies the complexity of human identity and the diversity of individuals and unwittingly reinforces patterns of social inequality.

In this article, I focus on the same pitfalls in traditional analytical frameworks as those raised by feminist theorists in the "difference debate." The difference debate broadly encompasses feminist criticisms of the Supreme Court's use of "gender" in sex discrimination cases. For example, feminists have criticized the Court's failure to recognize that historical attitudes about men's and women's gender roles are a critical element of sex discrimination claims. More recently, feminist theorists have argued

7 ROBSON, supra note 5, at 23.
8 Minow, supra note 6, at 46.
9 Id.
10 See Joan Wallach Scott, Gender and the Politics of History 28-50 (1988); see also Joan Wallach Scott, Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism, in Conflicts in Feminism 134-48 (Marianne Hirsch & Evelyn Fox Keller eds., 1990) [hereinafter Deconstructing Equality]. Professor Scott builds on Michel Foucault's theories of social constructionism to set forth two important aspects of her deconstructive methodology for "gender" as a tool of historical analysis: (1) "gender" is knowledge about sexual difference; and, (2) knowledge means "the understanding produced by cultures and societies of human relationships, in this case of those between men and women." Scott, Gender and the Politics of History, at 2. Knowledge in the latter sense is never absolute; it is relative, produced in complex ways and within epistemic frames that themselves might have a quasi-autonomous history. See also Deborah L. Rhode, Justice and Gender 1-14, 305-21 (1989); Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955 (1984); Christine Littleton, Reconstructing Sexual Equality, 75 Cal. L. Rev. 1279 (1987); Minow, supra note 6, at 12-13; Alison M. Jaggar, Sexual Difference and Sexual Equality, in Theoretical Perspectives on Sexual Difference 239-54 (Deborah Rhode ed., 1990).
that traditional frameworks (and their use of categories such as "race" and "sex") define harm in ways which deny the experiences of women of color who are injured by "racist sexism" or "sexist racism." Both of these criticisms address the dangers of using categories which presume that the harm to an individual can and should be broken down into simple, unrelated elements—elements ultimately defined according to a white, male, middle-class standard of equality.

This article also argues that lesbian legal theory, which has also criticized traditional frameworks of analysis, embraces the arbitrary categorization process it has sought to dismantle. Lesbian legal theory is politically strong yet theoretically weak. Its political strength lies in its assessment that the feminist community has noticeably failed to include the lesbian perspective in its theorizing. The failure to articulate a holistic feminist theory that consistently connects the ways in which gender ideology not only oppresses women, but also feeds anti-gay prejudice, accounts for the call to separate lesbians from the feminist domain of activism and theory. However, the theoretical weakness of lesbian legal theory is that it perpetuates the problematic idea that lesbian invisibility should be remedied by simply carving out theories around singular traits by which a person might self-identify.

In my view, any legal theory ensconced on a singular trait, such as lesbianism, founders for two reasons. First, the public policies of nondiscrimination and tolerance of diversity which undergird the traditional analytical frameworks should continue to guide any progressive theorizing about discrimination. Discrimination theories based on arbitrary categories that never entirely capture a person’s full identity fail to advance a meaningful principle of equality. Equality principles should be based on a constitutional guarantee of respect for individuals, regardless of their gender, race, ideology, religion, class, sexual orientation, etc. Second, lesbian legal theory ignores the critical relationship between gender role stereotyping for women, and homophobic attitudes that harm lesbian women and gay men. Thus, lesbian legal theory not only essentializes the experiences of lesbian women, it also fails to recognize that homophobia is a feminist issue.

My analysis applies feminist critiques of the traditional categorization process to situations where neither the governing paradigms, nor what has


12 My own reservations about the efforts to develop a lesbian legal theory are similar to those of non-legal theorists who believe that trying to define a "lesbian culture" smacks of lesbian "imperialism" (defining lesbianism according to a Western industrialized notion of what it means to be "lesbian"). "Lesbian" may signify a political act, an emotional existence, a philosophy, an identity, or simply living with women. See Ann Ferguson, *Sexual Democracy: Women, Oppression, and Revolution* 133-58 (1991).

13 ROBSON, supra note 5, at 21-23.
been called a perspective of the "intersectionality"\textsuperscript{14} of dual categories (such as race and sex) entirely capture the potential breadth of prejudices that may impact a victim of discrimination. I suggest an alternative perspective of multiple intersectionality—a "holistic/irrelevancy" theory. This perspective rejects any attempt to analyze discrimination by forcing facts into a model that assumes that categories must be analyzed separately. It also uncovers unconscious attitudes which play a role in cases involving complex patterns of social identity and prejudice.

Part II of this article explores the premises and pitfalls of the reigning paradigms of equality theory, and demonstrates why their paradigmatic conditions are not easily applied to gay people.

Part III responds to lesbian legal theory by highlighting the ways in which the arbitrary categorization process that separated "sex" from "gender" also divorced "sexual orientation" from the former two. Thus, unwittingly, lesbian legal theory both emerges from and reinforces the arbitrary categorization process critiqued in this article. In so doing, lesbian legal theory fails to recognize the critical relationship between homophobia and gender-role stereotyping that has traditionally oppressed women.

Part IV presents my "holistic/irrelevancy" paradigm for analysis of discrimination cases. This paradigm incorporates the underlying public policy of traditional paradigms with the feminist insights emerging from the difference debate. I illustrate the need for a reformulated perspective through the use of several hypotheticals.

II. DIFFERENCE, IDENTITY, PREJUDICE, AND THE SEARCH FOR REALISTIC MODELS OF EQUALITY

A. The Reigning Paradigms of Equality Theory

"Equality" is inextricably linked to the social phenomenon we call "discrimination." At the simplest level, discrimination occurs whenever interactions between people are based on their personal differences. Sorting out differences between people is often regarded as our natural response to the vast diversity of human experience.

Discrimination theory is concerned with the law's role in determining whether individuals or governments have discriminated unfairly. Thus, in the legal context, the law imposes limits on the manner in which certain classifications of individuals are made, such as prohibiting the segregation of black and white children in public schools.\textsuperscript{15} On the one hand, then, discrimination law and equality theory speak of individuals treating each other as the same or different. On the other hand, these concepts also refer

\textsuperscript{14} Crenshaw, \textit{supra} note 11.
to the overarching oppression of entire social groups. For example, an employer may be held liable for using policies that exclude not only one person, but also members of an entire class of people, from a certain job or activity. Modern discrimination case law is full of references to these two ways of understanding discrimination. Nonetheless, their relationship to each other, and the tension they have engendered in those who theorize about discrimination and equality, is not always made clear.

Most Americans want to believe that our nation has learned important historical lessons about the harm of unfair discrimination and that these lessons strengthen our system of justice and constitutional law. Our political rhetoric consistently appeals to the value of freedom from discrimination and arbitrary treatment based on traits fundamental to personal identity. These phenomena strengthen the American system of justice and their con-

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17 Id. at 272 (providing a social meaning of discrimination as "conscious actions and policies by which members of a group are excluded from institutions or confined to inferior positions").

The legal definition of "discrimination" is much more limited. A person cannot receive monetary or equitable relief from the alleged perpetrator of a discriminatory act unless s/he can meet the legal burden of proof. This burden entails showing illegal treatment based on a specific set of irrelevant criteria, such as race, sex, or religion, for hiring, promotion, or firing decisions. For example, Title VII provides structural remedies in the form of disparate impact claims, but, of course, can offer remedies only in the limited area of employment. Furthermore, until the recent changes to Title VII, effected by § 105 of the 1991 Civil Rights Act, the Supreme Court articulated principles that made it more difficult to establish disparate impact under Title VII, unless the plaintiff could isolate the specific policy that inflicted the alleged harm. See, e.g., Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657, 659 (1989); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991, 997 (1988) (disparate impact claims can be made against employment practices but the employee retains the burden of proof in showing no business necessity for the employment practice).


18 This tension dates back to our earliest race-relations cases. In Plessy v. Ferguson the Supreme Court endorsed a notion of group-based equality, holding that distinctions made by the state would not violate the Equal Protection Clause if facilities for blacks and whites were separate but equal. 163 U.S. 537, 540-41 (1896). Almost twenty years after Plessy, the rationale for the separate but equal doctrine was couched in individual-regarding rhetoric. See, e.g., McCabe v. Atchison, Topeka & Santa Fe Railroad Company, 235 U.S. 151 (1914). In McCabe, Oklahoma was prohibited from authorizing racially segregated railroad coaches and dining cars. The Court stated, "[I]t is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility of convenience in the course of his journey which, under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded."

235 U.S. at 161-62.

More recently, Regents of the University of California v. Bakke further explored the tension between individual-regarding and group-based notions of equality. 438 U.S. 265 (1978).
continuing social approval allows the courts to remain powerful instruments for changing social attitudes about difference.

For example, *Brown v. Board of Education* affected social change through its enduring message about racial attitudes. This message rings clear each time a court rejects efforts to impose discriminatory values, such as the white supremacist biases embedded in patterns of racial segregation. However, because it is also part of the social and human condition to form communities around traits such as religion or race, scholars and judges continue to disagree upon how far the government should interfere with this community-forming process. Tension over the proper extent of governmental or judicial interference in the formation of community or social identity arises from the interplay between the two basic frameworks courts traditionally use to resolve discrimination claims. These frameworks are discussed below.

1. The Group-Based Model of Equality

In the late 19th century—particularly the era of Radical Republicanism during which the Fourteenth Amendment was drafted—American society drastically changed. At this time, the Court declared the commonplace and accepted act of distinguishing people on the basis of race unconstitutional. A simple message emerged from this period: certain kinds of personal and governmental classifications of people would be viewed as illegal. Fur-

20 Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). In a unanimous opinion, the Court recognized the tendency of people of the same race to congregate and acknowledged the danger of state-sanctioned patterns of racial segregation. 402 U.S. at 11. The Court stated that lower courts could impose race-conscious remedies (e.g. busing) to undo the effects of past de jure segregation. The Court only referred to individual-regarding equality by acknowledging that an individual might wish to transfer from a school where she was the member of a racial majority, to one where she would be the member of a racial minority. 402 U.S. at 26.
22 Today we recognize discrimination law and theory as intimately connected to the language of "suspect-ness" and "suspect classes," which arose in the context of racial antagonism towards Japanese-Americans. See Korematsu v. United States, 323 U.S. 214 (1944). But the traditional historical justification of prohibiting certain kinds of personal mistreatment because of one's race, religion, or other identity arose in the context of race relations between whites and blacks after the Civil War. The Fourteenth Amendment equality principle, responding to our history of black enslavement, has inspired various 20th century civil rights laws. These include laws that prohibit discrimination on the basis of race, religion, national origin, sex, disability, age, sexual orientation, marital status, and ethnicity. See generally Theodore Eisenberg, *Civil Rights Legislation* 3-56 (1991); William E. Nelson, *The Fourteenth Amendment* 197-200 (1988); Donald W. Jackson, *Even the Children of Strangers: Equality Under the U.S. Constitution* 28-45 (1992); Judith A. Baer, *Equality Under the Constitution: Reclaiming the Fourteenth Amendment* 57-87 (1983).
thermore, the federal courts would play a special role in ensuring that particular classifications, such as race-based distinctions, would never be reinstated. By extending "equal protection" to people regardless of the color of their skin, the principle of equality affirmed a fragile, yet clear, notion of the individual's inherent moral worth.

Despite this new emphasis on equal protection, a series of Reconstruction era Supreme Court decisions reflected society's continued tolerance of racial classifications. This tolerance was epitomized by the view that a racial classification is constitutional as long as each class is treated "equally"—a view that persisted for over fifty years. The infamous *Plessy v. Ferguson* articulated this vision of group-based equality.

Another version of group-based equality emerged several decades later, in the now famous footnote four to *United States v. Carolene Products Co.* While the Court in *Carolene* upheld a "reasonable" piece of state legislation, it warned that courts might, on occasion, have to exercise an antimajoritarian check on legislative powers when a law discriminates against "discrete and insular minorities.

The background history of racial slavery and the articulated purposes for the various Reconstruction Amendments encourage many lawyers in post-*Caroline* decades to assume that the concepts "discrete" and "insular" apply mainly to social groups that can be visibly identified. Moreover, *Carolene* suggested that protection from prejudice lay in the courts. This judicial check, conceived of as a special duty, was justified by the constitutional prohibition of arbitrary prejudice against minorities. Such minorities, burdened by a history of social discrimination, had little hope of protection from tainted political processes. The "discrete and insular minority" model thus evokes images of victimization in order to trigger judicial protection, or "strict scrutiny," of either private or public acts that negatively impact a politically powerless social minority. This model is the basis of holdings in cases such as *Griggs v. Duke Power Co.*, which involved a race-based employment discrimination claim under Title VII of the Civil Rights Act of 1964. The Court in *Griggs* articulates the illegality of disparate group out-

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24 See supra notes 22-23.

25 163 U.S. 537 (1896).


27 Id. at 152-53.


29 Ackerman, *supra* note 21.

comes resulting from hiring criteria that bear no relevance to the job at hand.\textsuperscript{31}

Most contemporary scholars agree that the Fourteenth Amendment Equal Protection Clause, originally designed to remedy the social and political conditions of freed black slaves, has evolved through judicial interpretation into the source of a distinct constitutional protection against personal, arbitrary discrimination.\textsuperscript{32} Current discrimination law rarely confronts the explicit forms of group-based discrimination so frequently addressed and legitimized by the courts during the Jim Crow era.\textsuperscript{33} Rather, courts today most often address only the vestiges of explicit discrimination, such as unconscious assumptions and stereotypes. Finally, though scholars may disagree as to the intended breadth of the principle of "equal protection of the law,"\textsuperscript{34} it is clear that the guarantee of "equality" entails some notion that we all possess an inherent moral worth regardless of our differences.\textsuperscript{35}

2. The Individual-Regarding Model of Equality

The rhetoric surrounding the group-based model often obscures the public policy that undergirds its close relative, the individual-regarding or "irrelevancy" model of equality. The irrelevancy model reminds individuals and governments that under the Constitution certain personal traits are not legitimate classifying criteria. To this end, the rhetoric of irrelevancy argues that equality means never considering one's race, sex, religion, or national origin, for classification purposes. This model thus contains two considerations. First, as human beings who are identified by several personal traits, such as age and race, we are also a member of a larger class of "all persons" or individuals. Second, given one's membership in the class of all persons, the law demands that all class members be accordingly treated as equals. The second consideration contains an idealized notion of

\begin{itemize}
\item \textsuperscript{31} Id. at 429-33.
\item \textsuperscript{32} Norwood v. Harrison, 413 U.S. 455, 469 (1973) ("the Constitution . . . places no value on discrimination . . .").
\item \textsuperscript{33} See, e.g., Gong Lum v. Rice, 275 U.S. 78 (1927) (holding that the separate but equal doctrine would allow a state to place an Asian girl in a racially separate school for blacks); Corrigan v. Buckley, 271 U.S. 323 (1926) (holding that racially restrictive covenants regulating the transfer of real property are not state action); and Grovey v. Townsend, 295 U.S. 45 (1935) (holding that whites-only electoral primary is not state action). See also Woodward, supra note 28; Kluwer, supra note 28.
\item \textsuperscript{34} See supra note 22. See also Paul Brest, Forward: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1 (1976); Ruth Colker, Anti-subordination Above All: Sex, Race, and Equal Protection, 61 N.Y.U. L. Rev. 1003 (1986); Baer, supra note 22.
\item \textsuperscript{35} "Equality" does not have a fixed political, social, or philosophical meaning. Rather, certain ideas or principles that appear as part of specific social/political contexts are deeply influenced by changing social attitudes and emergent political circumstances. See J.M. Balkin, Ideological Drift and the Struggle Over Meaning, 25 Conn. L. Rev. 869, 870-71 (1993).
\end{itemize}

In the midst of this rhetorical struggle, however, some legal philosophers have tried to articulate a principled justification for the right to equal respect for one's inherent moral worth. See, e.g., Ronald Dworkin, Taking Rights Seriously 180-83, 272-78 (1978).

personal equality, and declares that certain personal traits, such as skin color, are irrelevant to the process of deciding whether to grant or deny a right, privilege, or benefit.

In the latter part of the 20th century, ideas of individual-regarding equality have fueled intense criticisms of the group-based model of equality. This is particularly true in the context of legal challenges to any government-supported effort, through affirmative action programs, to remedy the vestiges of racial and sexual discrimination. Criticisms of the group-based model of equality have surfaced in reverse discrimination claims such as Regents of the University of California v. Bakke. Grounded in the rhetoric of irrelevancy, or the prohibition against using certain personal traits as classifying criteria, a white male plaintiff successfully challenged a medical school's admissions policy that set aside sixteen seats for black and Hispanic applicants. Bakke felt that his membership in the white race was the basis of an unfair policy that presumptively classified who was qualified to attend the medical school based on race rather than academic potential.

Similar irrelevancy rhetoric supported the claim of the male plaintiff in Johnson v. Santa Clara. In Johnson, a disgruntled, but ultimately unsuccessful, plaintiff argued that he was denied a promotion because of the Department's illegal affirmative action hiring policy which preferred women over men. There, however, the Department proved that the gender-based hiring criteria was but one of several considerations used to hire or promote job applicants. In both Johnson and Bakke, the plaintiffs advocated a model of equality under which neither the Constitution nor the government tolerate inconsistent public policy. According to the plaintiffs, a public policy which prohibits discrimination against members of racial minorities while permitting discrimination against members of the white male majority is inherently inconsistent.

Individual-regarding or irrelevancy equality is not antithetical to group-based equality. Rather, these two models articulate a different version of the meaning of equality. Advocates of the group-based model often premise their views not only on the concept of irrelevancy, but also on the cultural acknowledgement that our nation is burdened by a history of legalized racism and sexism. Moreover, they frequently argue that the constitutional promise of equality means not only dismantling discriminatory barriers, but also preventing, through affirmative efforts, the perpetuation of vestigial discrimination. Therefore, it is the legacy of abuse and the fear

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37 Id. at 275-78.
38 Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616 (1987) (woman who scored two points less than plaintiff in an interview was promoted instead of plaintiff).
39 Id. at 622.
that, without preventive measures, the abuse could recur alleviate the discomfort arising from benign race-conscious measures aimed at remedying the social and economic effects of vestigial racism and/or sexism.

The group-based model embraces the principle of the individual-regarding model by recognizing that although an individual may suffer personal discrimination, the source of the harm is often a group-based generalization about that individual. However, despite the relationship between the two models of equality, a dichotomous rhetoric has developed which pits the individual-regarding model against the group-based one. This rhetoric incorrectly implies that there can be only one true version of equality.41

Yet these two models are not mutually exclusive. The strength of the irrelevancy model is that it brings to the foreground an underlying assumption of the group-based model: our personhood—or respect for the total individual—is important. Arbitrary labels and categories should not define our identity or provide the basis for depriving (or granting) a job or other benefit. In its most idealistic phrasing, the individual-regarding model echoes Justice Harlan’s dissent in *Plessy v. Ferguson*,42 asserting that the Constitution is colorblind.43

This strength notwithstanding, the individual-regarding model cannot be the sole criterion for meaningful equality because, although the Constitution is colorblind, people are not. In other words, in some situations, social justice is unattainable without an exploration of unconscious social attitudes—the vestiges of systems of overt discrimination—that perpetuate inequality.

**B. The Relevance of the Reigning Paradigms to Lesbians and Gay Men**

Lesbians and gay men deserve the equal protection of the law. Whether one analogizes their experience of discrimination to a “minority” experience, or like that of women, based on arbitrary attitudes about gender, they qualify no less than other groups as a “suspect class” needing judicial protection against invidious discrimination. Yet, accepted interpretations of either the group-based model or the individual-based model have proved problematic for victims of anti-gay or anti-lesbian discrimination.

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42 163 U.S. 537 (1896).

43 *Id.* at 559 (Harlan, J., dissenting).
The analytical frameworks that grew out of footnote four in *Carolene Products Co.* create difficulties in the construction of equal protection claims for lesbians and gay men. *Carolene's* promise of a judicial antimajoritarian check to protect "discrete and insular minorities" has endured throughout this century as the paradigm of equality analysis. Because, under traditional interpretations, the aim of the group-based model of equality is to eradicate the oppression of identifiable social minorities, its various concepts have been difficult to apply to the category of personal traits we call "sexual orientation."

Some of these analytical difficulties arise from assumptions about the meaning of "discrete and insular." For example, existing equality rhetoric emphasizes that the guarantee of equal treatment is founded on political precepts lying at the core of Republican democracy, such as faith in the political process. In this vein, scholars like Paul Brest have argued that an antidiscrimination principle (flowing from the constitutional guarantee of equality) guards against certain defects in the political process from which race-dependent decisions are made, and also against harmful results aimed at particular groups. Feminist scholar Ruth Colker argues for a social context of equality, and believes the antidiscrimination principle's primary aim is to ensure that certain groups do not have a subordinated status because of their lack of power in society.

As a number of scholars have now recognized, the group-based model does not easily apply to gay people. First, gay men and lesbians are not necessarily politically powerless. Second, homosexual orientation is not a visible trait. Furthermore, there is no consensus on whether or not homosexuality is biologically determined. The possibility of "choice" and sexual "preference" contradict the paradigmatic requirement of the "immutability" of a personal characteristic.

The individual-based model is no more easily applied to gay people. A lesbian or gay litigant is unlikely to prevail in arguing that sexual orientation is an irrelevant trait for dispensing benefits and burdens. Rarely is the subject of sexual orientation as a personal trait distinguished from the

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44 304 U.S. 144 (1938).
45 Id. at 153 n.4.
46 Brest, supra note 34, at 1-6 (1976).
47 Colker, supra note 34.
48 See Ackerman, supra note 21, at 723-25 (discussing the pluralist political science assumptions built into the concept of "discrete and insular minorities"). Judges who mechanically apply the tests of the suspect class model may conclude that gay claims do not merit heightened scrutiny because gay people are not a politically powerless minority. See Evans v. Romer, 1993 WL 518586, at *11 (D. Colo. Dec. 14, 1992).
issue of homosexual conduct. Thus, even if the trait is "irrelevant," the conduct, to some, is not.

This failure to separate the trait from the conduct grounds the Supreme Court's decision to uphold the constitutionality of sodomy statutes criminalizing homosexual conduct. It also explains the recently negotiated "Don't Ask, Don't Tell" military policy under which lesbians and gay men may serve, but not openly. Not only must gay servicemen and women hide that they engage in homosexual behavior, homosexual conduct (on or off base) remains a criminal offense under the Uniform Code of Military Justice.

The prevailing conduct/identity split also explains how some judges in custody battles bypass the "irrelevant" trait of the mother's lesbian identity, thus forgoing the use of heightened scrutiny of the attempt to cut off her parental rights. The judges reach instead for the "relevance" of her sexual conduct, which provides a basis for depriving lesbians of parental rights under the more lenient standard of the "best interest of the child."

The arbitrary splitting of discriminatory animus into two seemingly opposed value realms has been called the "conduct/status dilemma." This dilemma, emerging in the context of gay and lesbian litigation, correlates with the difference debate's critique of the Supreme Court's use of gender as a category of legal analysis. Scrutinized carefully, the difference debate reflects a problem in the understanding of discrimination encouraged by traditional methodology. This understanding assumes that discrimination is characterized by certain neatly defined categories. It also assumes that these categories exist as separate, discrete experiences.

Unfortunately, a number of courts read Bowers' ruling, which is based on privacy doctrine, to reject the plausibility of an equal protection challenge for lesbians and gay men. See, e.g., Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) (holding that status, defined by conduct that states are entitled to criminalize, is not deserving of strict scrutiny under the equal protection Clause); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) (holding that Bowers impacts the level of scrutiny under equal protection analysis); High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) ("[B]y the Hardwick majority holding that the Constitution confers no fundamental right upon homosexuals to engage in sodomy, and because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes"). Cf. Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989) (en banc), cert. denied, 498 U.S. 957 (1990) (vacating previous holding by three-member panel that the military ban against lesbians and gay men was unconstitutional). See Watkins v. United States Army, 847 F.2d 1329 (9th Cir. 1988), vacated, 847 F.2d 1362 (9th Cir. 1988) (granting reh'g en banc).

The factual patterns in lesbian custody battles vary. Most involve a challenge by a father/ex-husband on the grounds that the mother's lesbianism will harm the child. Thus, some courts have held that a parent's homosexual orientation is presumptively not in the best interest of the child. See, e.g., S.E.G. v. R.A.G., 735 S.W. 2d 164 (Mo. App. 1987); Jacobson v. Jacobson, 314 N.W.2d 78 (N.D. 1981); Roe v. Roe, 228 Va. 722, 727 (1985). For challenges by third parties, see Chaffin v. Frye, 45 Cal. App. 3d 39 (1975) (lesbian mother's parents granted custody); Roberts v. Roberts, 25 N.C. App. 198 (1975) (aunt and uncle of lesbian mother granted custody).


See supra note 10 and accompanying text.

See supra note 17.
These assumptions create special constraints which deeply influence our way of thinking about discrimination law. One constraint created by traditional discrimination rhetoric is the placement of categories in opposition to each other (such as man versus woman, white versus black). In the context of the difference debate, this oppositional relationship has resulted in analyses which characterize women's “differences” as deviating from the standard of equality set by men.57 In that context, then, a difference such as pregnancy becomes entirely inconsistent with the presumed sameness required for an equality-based analysis.58

A similar tension occurs in gay and lesbian discrimination cases. Gay sexuality is typically cast in opposition to the sexual norm of a heterosexually-dominant culture.59 Consequently, homosexuality can conveniently be cast as falling outside of the paradigm that encourages a court to rule, for example, that anti-lesbianism unfairly strikes at the core of a woman's gender identity.60

Contemporary American society continues to question whether homosexuality is “normal” or a problem in search of a cure. This questioning occurs at a time when, according to cultural theorist Jeffrey Weeks, members of society are increasingly aware that sexuality is dynamic and fluid. What we recognize as “the sexual” is a product of change, culture, and language.61 As long as homosexuality is characterized in opposition to, and deviating from, the standard of heterosexuality, it remains a “difference” which neither merits nor receives an equality based analysis.

60 John Stoltenberg, You Can't Fight Homophobia and Protect the Pornographers at the Same Time: An Analysis of What Went Wrong in Hardwick, in THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM 184-90 (D. Leidholdt & J. Raymond eds., 1990) (arguing that homophobia and sex-based oppression are inextricably linked). See also Judith Butler, Subversive Bodily Acts, in WOMEN AND THE LAW 75-80 (Mary Jo Frug ed., 1992) (arguing that gender is a fabrication and a “fantasy” institute and inscribed “on the surface of bodies;” thus cross-dressing is an example of the imitative quality of gender and its contingency).
61 WEEKS, supra note 2, at xi-xx.
61 WEEKS, supra note 5.
1. The Law and Politics of Sexual Identity

Contemporary sexual identity politics emerged from the mid-20th century sexual revolution, which culminated in the 1970's gay civil rights movement and lifted the cultural barrier against speaking about and identifying with sexual difference. This revolutionary defiance of sexual conformism empowered women and men to claim a sexual identity for themselves, whether it be gay, lesbian, bisexual, heterosexual, or transgender. For the members of persecuted sexual minorities, the embrace of a sexual identity has become a cry for freedom as well as the source of claims for justice in the courts. The recent explosion of “queer” or “gay” or “lesbian” legal theory can thus be characterized as a rejection of the internalized homophobic values that have traditionally forced gay men and lesbians to mask their sexual difference and to closet their private relationships.

Traditional frameworks of legal analysis have not dealt easily with the matter of sexual difference and clearly do not embrace the notion of homosexual identity, which is premised on rejecting traditional notions of gendered social and sexual behavior. Thus, the major flaws inherent to the reigning paradigms, and the arbitrary categorization they induce, render these methods of analysis unreliable as frameworks for resolving equal treatment claims. Moreover, these paradigms disparately impact, and provide a disservice to, lesbian and gay litigants.

2. The False Separation of “Sex” and “Gender” from “Homosexuality”

Traditional models of analysis do not recognize claims of anti-gay or anti-lesbian sexism. This lack of recognition results from the ways in which traditional analysis defines and arranges categories, arbitrarily splitting apart “sex” and “gender” from “sexuality” or “sexual orientation.” The Supreme Court has, due in part to the influence of feminist theory, transformed legal doctrine in cases involving women’s rights. In contrast, feminist theory and jurisprudence have failed to fully explore the relationship

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62 According to Weeks, this preoccupation with identity cannot be explained as an effect of a peculiar personal obsession with sex. It has to be seen, more accurately, as a powerful resistance to the organizing principle of traditional sexual attitudes, encoded in the dominant and pervasive heterosexual assumption of the sexual tradition. It has been the sexual radicals who have most insistently politicized the question of sexual identity. But the agenda has been largely shaped by the importance assigned by our culture to the ‘correct’ sexuality, and especially to the correct sexuality of men.

between gender discrimination and anti-homosexuality. Consequently, most courts assume that gender has little to do with lesbian or gay discrimination.

In employment law, for example, lesbian and gay litigants have not benefitted from the prohibition of sex-based discrimination in Title VII of the Civil Rights Act of 1964 because of an undisturbed precedent from the late 1970's holding that the term "sex" only reaches traditional notions of gender. For that court "gender" meant women.

a. *De Santis v. Pacific Tel. & Tel. Co., Inc.*

In *De Santis*, two gay men and one lesbian sued their private employer under the Title VII provision that prohibits discrimination "because of sex." Both the trial and appellate courts dismissed their claim on grounds that Congress intended to limit the term "sex" in Title VII to "its traditional meaning." That traditional meaning, it held, meant placing women on an equal footing with men. To expand the meaning of sex to include sexual orientation, the court stated, would overreach the legislative intent. The court also rejected a disparate impact claim brought by gay men under a sex-based discrimination theory, grounded on the notion that because gay male homosexuality was easier to identify, gay men experienced more discrimination than lesbians.

The underlying concern in *De Santis*, of course, was how far a male claimant can carry the proposition that "sex" is a concept that reaches beyond liberating women from male oppression. The answer, according to the *De Santis* court, is not very far. The gay male plaintiffs argued that their discrimination rested on stereotyped beliefs about male virility, given that one plaintiff has been deemed "effeminate" because he wore a single gold earring. Nevertheless, the court held that "effeminacy" (and discrimination because of it) had nothing to do with gender. Thus, the meaning of "sex" was not extended beyond the "traditional meaning of gender." *De Santis*, then, affirmed that cross-gender assumptions about women and men had very little to do with sex-based discrimination.

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65 *De Santis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329 (9th Cir. 1979).
67 608 F.2d 327 (9th Cir. 1979).
69 608 F.2d at 329.
70 *Id.*
71 *Id.*
b. *Price Waterhouse v. Hopkins*

Surprisingly, the Supreme Court's more recent interpretations of Title VII clearly suggest that harmful cross-gender assumptions do create a viable claim under Title VII. Yet, consistent with *De Santis*, this claim is not available to men. In *Price Waterhouse v. Hopkins*, the plaintiff proved that she was denied partnership at a large accounting firm because she was stereotyped as being "too macho," a woman who needed to "walk and talk like a lady, wear make-up and go to a charm school." Does *Hopkins* then suggest that the term "sex" in Title VII prohibits an employer from using cross-gender assumptions to evaluate the worthiness of any employee or applicant? Read together, *De Santis* and *Hopkins* are inconsistent. Nevertheless, it is clear that a court would not consider sexual orientation encompassed by the term "sex" in Title VII.

Although the logic of *Hopkins* should apply as forcefully to the claim raised in *De Santis*, a court today could conveniently avoid that conclusion. It could decide, as in *De Santis*, that "sexual orientation" is not about sex or gender. It could also invoke the symbolic power of *Bowers v. Hardwick* which upheld the laws frequently invoked to justify discrimination against lesbians and gay men. In other words, courts can resort to old paradigms based on nature/biology to separate behavior from identity, conveniently affirming the power of the state to regulate "abnormal" antisocial behavior.

Under these rulings, advocates for lesbian and gay plaintiffs relying on the law to effect social change confront at least two problems. First, legal methodology requires that fact situations fit into rigidly defined categories. Second, once courts define categories as inherently different from or inconsistent with each other, it becomes difficult to challenge the idea that certain concepts were ever related. A false characterization of the problem then precludes an inquiry into how these concepts originated.

The arbitrary split between sex and gender on the one hand, and sexuality and sexual identity on the other, has never been healed. Instead, what has appeared is a mirroring of that split by a full body of feminist scholar-

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72 490 U.S. 228 (1989).
73 Id. at 235.
74 478 U.S. 186 (1986).
ship that rarely addresses homosexuality,\textsuperscript{75} as well as the recent rise of a lesbian legal theory movement.\textsuperscript{76}

The illusory disjunction between gender and homosexuality has been revealed by at least one critic of \textit{Bowers v. Hardwick},\textsuperscript{77} who argues that the anti-homosexuality licensed by sodomy statutes is as much about sex discrimination and misogyny as it is about refusing to extend privacy rights to gay people.\textsuperscript{78} Lesbians and gay men embrace the claim of "equal rights" in the hope that they will be judged not by their sexual behavior, but by their personhood, feelings, or their moral worth. Yet, anti-homosexual prejudice conditions an individual's worth upon having the "right" sexual orientation—heterosexual. The continued criminalization of homosexuality perpetuates this discrimination.

Recent cases such as \textit{City of Dallas v. England}\textsuperscript{79} illustrate how discrimination against lesbians and gay men is rooted in unconscious assumptions about "normal" versus "abnormal" sexuality, and in reactions to the continued criminalization of homosexuality in certain states.\textsuperscript{80} Mica England applied for a job with the Dallas Police Department and admitted in an interview that she was a lesbian. She was presumptively disqualified from

\textsuperscript{75}See supra notes 6 & 10. I found a rather vivid illustration of how feminist scholars have ignored the critical connection between "gay rights" and "women's rights" in a bibliography on women and legal scholarship prepared by the \textit{Iowa Law Review}. Topics are so arranged in this issue as never to mention a subcategory for the subject of homosexuality as a specific "gender" issue. Only four of the approximately 1,000 titles addressed lesbian and/or gay issues, giving the impression that "gender" and "homosexuality" have little to do with each other. See Paul M. George & Susan McGlamery, \textit{Women and Legal Scholarship: A Bibliography}, 77 \textit{Iowa L. Rev.} 87, 87-177 (1991). Yet, early feminist legal tracts recognize the critical connection between homosexuality and women's equality. See \textit{MacKinnon, Sexual Harassment}, supra note 6, at 200-06. One of the few scholars who refers to issues affecting lesbians and gay men is Deborah Rhode, but she does not directly discuss the relationship between homosexuality and gender theory. See Rhode, supra note 10.

\textsuperscript{76}See supra notes 12-13 and accompanying text.

\textsuperscript{77}478 U.S. 186 (1986).

\textsuperscript{78}Stoltenberg, supra note 60.

\textsuperscript{79}846 S.W.2d 957 (Tex. Ct. App. 1993) (writ dismissed) (the Dallas police department may not rely on an unconstitutional sodomy law to avoid hiring an openly lesbian applicant).

\textsuperscript{80}Approximately 25 states and the District of Columbia criminalize homosexuality under a variety of terms including sodomy, sexual misconduct, deviant sexual intercourse, crime against nature, unnatural and lascivious acts, buggery, lewdness, and gross indecency. Robson, supra note 5, at 47, 58. The states of Texas, Montana, Nevada, Missouri, Arkansas, Kansas, and Tennessee apply their sodomy laws only to homosexuals, not heterosexuals. Texas Human Rights Foundation, Morales et al. v. The State of Texas: Texas Human Rights Foundation's Legal Challenge of § 21.06 of the Texas Penal Code (n.d.) (fact sheet, on file with the Berkeley Women's Law Journal). Courts in Michigan and Kentucky have recently held their states' sodomy laws to be unconstitutional under state constitutions. These decisions refute the reasoning of the Supreme Court in \textit{Bowers v. Hardwick}, which held that because the prohibition of homosexuality had "ancient roots," there is no fundamental right to homosexual sodomy. Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

consideration for the job on the grounds that her lesbian sexuality was illegal under the Texas Penal Code. Although the Texas sodomy law is not enforced, employers continue to rely on it to justify discrimination against lesbians and gay men.

Thus, actual enforcement of sodomy laws is not the primary mode of discrimination against gay people. These laws, however, license prejudice. Combined with misperceptions and stereotypes, they serve two basic purposes—they relegate gay people to a degraded social status, and they perpetuate stereotypes about what it means to be a woman or a man.

The theoretical connection between gender and homosexuality forced itself onto the American cultural scene very recently by the furor over President Clinton's effort to lift the military ban on homosexuality. During the debate, heterosexual men voiced their fear that the openly gay soldier will be a sexual predator, and that gays will sexually objectify them and treat them just like "these straight men have been objectifying and treating women. . . . [T]hese straight men feel they will be effeminized by gay men."

This quote by University of Chicago sex historian George Chauncey highlights at least two elements of the relationship between gender and homosexuality. The first is the notion that "gayness" is about crossing the strict sexual boundaries between men and women. The second is that all homosexual relationships parody the heterosexual model of sexual relationships—that one of the partners in a same-sex relationship must either be "feminized" or "masculinized." The heterosexual aversion to same-gender

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81 TEX. PENAL CODE ANN. § 21.06 (West 1994).
82 See supra note 80.
83 The Pentagon policy that recently emerged from negotiations between gay rights advocates and Joint Chiefs of Staff on July 19, 1993, was a compromise. After President Clinton announced in late January 1993 that he intended to fulfill his controversial campaign promise to lift all bans against military service by gay men and lesbians, the various outcries by the military, the government, and the public were overwhelming. See, e.g., Pentagon Chief Warns Clinton on Gay Policy, N.Y. TIMES, Jan. 25, 1993, at A1; Eric Schmitt, Joint Chiefs Fighting Clinton Plan to Allow Homosexuals in Military, N.Y. TIMES, Jan. 23, 1993, at A1; John Balzar, Why Does America Fear Gays?, L.A. TIMES, Feb. 4, 1993, at A1; Eric Schmitt, Months After Order on Gay Ban, Military is Still Resisting Clinton, N.Y. TIMES, Mar. 23, 1993, at A1; Bernard E. Trainor & Eric L. Chase, Keep Gays Out, N.Y. TIMES, Mar. 29, 1993, at A15.

The old policy broadly made "homosexuality . . . incompatible with military service" and defined a homosexual as "a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts." 32 C.F.R. 41, app. A, § H (1992). The new policy purportedly distinguishes between homosexual identity and homosexual conduct, and assures that applicants for the service will no longer be questioned about their sexual orientation. But they will be informed that homosexual conduct, on or off-base, is still proscribed by the armed forces. There are numerous double meanings to the new policy; for example, investigations strictly for the purpose of determining sexual orientation are no longer allowed, and sexual orientation cannot be a basis for separation unless there is proof of homosexual conduct. Meanwhile, a homosexual act is defined to include a statement that the member is a homosexual or bisexual. See The Pentagon's New Policy Guidelines on Homosexuals in Military, N.Y. TIMES, July 20, 1993, at A16. For an excellent summary of the absurd implications of the military's justifications for the old policy, see Judith Hicks Stiehm, Managing the Military's Homosexual Exclusion Policy: Text and Subtext, 46 U. MIAMI L. REV. 685 (1992).
84 Balzar, supra note 83, at A14.
sexuality thus rests largely upon the perception that any sexual activity requires dominant and passive roles. For heterosexual men, gay male sex threatens traditional views of male supremacy because "gay sex" mandates an unacceptable role reversal and the "subordination" of one man to another.\textsuperscript{85}

As illustrated above, analyzing anti-homosexuality is both more simple and yet more complex than one would assume under traditional anti-discrimination frameworks. A reformulated perspective which addresses anti-gay and anti-lesbian discrimination must account for the cultural values that keep sodomy laws on the books, deprive them of the right to marry, or encourage political efforts to interfere with the struggle against anti-homosexuality witnessed in the recent voter initiatives in Colorado, Oregon, and Florida.\textsuperscript{86}

At least one court recently recognized that gays and lesbians are relegated to a degraded social status under the existing law. In \textit{Baehr v. Lewin}, the Hawaii Supreme Court based its holding on an understanding of anti-homosexuality as a form of sex-based discrimination.\textsuperscript{87} The \textit{Baehr} court held that the State's refusal to recognize same-sex marriages conditions access to multiple rights and benefits for Hawaii residents on the basis of sex.\textsuperscript{88} The \textit{Baehr} court rejected the argument that the marriage laws as enforced by the Hawaii Department of Health (DOH) did not discriminate against homosexual couples because of their "biologic inability as a couple to satisfy the definition of the status to which they aspire."\textsuperscript{89} Relying on the Supreme Court's analysis in \textit{Loving v. Virginia},\textsuperscript{90} in which a state's anti-miscegenation statute was held invalid under the Equal Protection Clause despite traditional or "customary" notions of racial segregation in the South, the \textit{Baehr} court similarly rejected the Hawaii DOH's argument that "valid


\textsuperscript{86} In November 1992, 53\% of the voters in the State of Colorado passed Amendment 2 which prohibited anti-discrimination measures promoting lesbians, gay men, and bisexual equal rights. On January 15, 1993, the day Governor Romer was to sign the Amendment, Federal District Judge Jeff Bayless issued an injunction, preventing the amendment from taking effect. Judge Bayless recognized two arguments in support of the injunction: (1) Amendment 2 impermissibly affects an identifiable class by targeting status rather than conduct; and, (2) Amendment 2 is unconstitutional because it would employ government power to sanction individual biases against gay people and interfere with their fundamental right to seek redress for the effects of bigotry in housing discrimination, employment discrimination, and hate crimes. \textit{See \textit{LESBIAN AND GAY LAW ASSOCIATION OF GREATER N.Y.}, LESBIAN/GAY LAW NOTES} at 1 (Feb. 1993). Copycat amendments have appeared in Oregon. Although a statewide measure failed in Oregon, two towns and four counties passed local bans. The state legislature responded by enacting a prohibition against such local measures. \textit{Oregon Lawmakers Ban Local Votes on Gay Bias}, \textit{N.Y. TIMES}, July 30, 1993, at A10.

\textsuperscript{87} 852 P.2d 44, 60-62 (Haw. 1993).

\textsuperscript{88} \textit{Id.} at 60-61.

\textsuperscript{89} \textit{Id.} at 61.

\textsuperscript{90} 388 U.S. 1 (1967).
marriage" meant customary notions of a union between a man and a woman.91

As long as we continue to accept the traditional frameworks of analysis, most courts will use rigidly defined categories that force (or exclude) the facts and the litigant within prescribed categories or exclude their claims altogether. Gays and lesbians will continue to lack the necessary tools for equitable resolutions and will have no avenue from which to explore how and why the defining categories became rigid and narrow.

C. Lessons from the Feminist Critique of the Reigning Paradigms

Some of the flaws in the governing paradigms of equality first appeared in the context of gender cases decided by the Supreme Court over the last two decades.92 Encouraged by the gender politics of the 1970’s, the Court initiated a doctrinal shift from upholding legal protectionism of women,93 to invoking a heightened scrutiny of sex-based classifications.94 Grounded in an assimilationist theory of nondiscrimination,95 the Court, in early sex discrimination cases, invoked the rhetoric of the group-based

91 852 P.2d at 62.
92 See Christine Littleton, supra note 10; Minow, supra note 6; Jaggar, supra note 10, at 239-54; Scott, supra note 10, at 167-77 (discussing “The Sears Case”).
93 See, e.g., Goeasert v. Cleary, 335 U.S. 464 (1948); Radice v. New York, 264 U.S. 292 (1924);
95 Feminist legal theorist Herma Hill Kay notes that the “minority” concept evolved in 1970’s sex-based discrimination litigation as an outgrowth of the assimilationist theory of nondiscrimination. The assimilationist theory assumes that the parties being distinguished (and unfairly treated) are similarly situated. The model initially worked in sex discrimination cases where men and women were clearly “similarly situated.” See, e.g., Reed v. Reed, 404 U.S. 71 (1971) (addressing the right to serve as executor of an estate). But as Kay correctly notes, it is extremely difficult to accommodate the anti-discrimination principle based on the minority concept in cases where differences based on sex simply cannot be ignored. HERMA HILL KAY, SEX-BASED DISCRIMINATION: CASES AND MATERIALS 566-67 (3d ed. 1988).

In this decade, feminists and other progressive theorists need to challenge existing paradigms for ensuring equality, so that old frameworks do not reinforce, but rather eliminate, entrenched patterns of discrimination. The rhetoric of anti-discrimination must be broadened and made compatible with traditional notions of discrimination which naively insist on a theory of equality that sees the hypothetical victims as "similarly situated." Such perspectives mock the social reality of complex power relationships that have traditionally advantaged white, middle-class men, and that are subtly perpetuated through myriad patterns of sexual, racial, ethnic, and cultural exclusion and discrimination. At a minimum, feminist legal theory must emphasize: (1) the public policy underlying all anti-discrimination law; (2) the relevance of historical attitudes in deconstructing patterns of racism and sexism; and, (3) the right of individuals to empower themselves socially and politically through nonviolent and nonprejudicial means, and to live free from fear of bias-related violence and unnecessary discrimination.
model of equality. In so doing, it noted that although women were not an oppressed minority, their socioeconomic status in relation to men resembled a minority experience.

The Court was subsequently unwilling to apply the group-based model to women. Instead, it articulated a different standard of judicial review for sex-based discrimination, stating that such classifications would elicit only intermediate judicial scrutiny. Consequently, the present generation of lawyers and judges were indoctrinated with a model of equality suggesting that most non-race-based forms of prejudice and discrimination are less harmful than those based on race. That, in turn, has encouraged a ranking of claims from greater to lesser harms and their concomitant levels of judicial scrutiny. This is but one example of the ways in which accepted antidiscrimination rhetoric precludes an understanding of the potential intersection of various analytical categories such as race and sex.

The assimilationist model of equality worked only in those cases where men and women were similarly situated. The Supreme Court faced a recurring conceptual dilemma first posed in Geduldig v. Aiello, which raised the issue of whether granting disability payments for pregnancy constituted special treatment of female employees. Under the purist version of the irrelevancy model articulated in gender cases as the sex-blind model of equality, the standard of equality was male. Using this model in cases such as Geduldig, the Court queried whether affording female but not male employees pregnancy leave under a disability plan would be illegal. Given the mandates of the paradigm, the obvious answer was yes. This logic also accounts for a later ruling that the exclusion of pregnancy from the list of insured disabilities was not sex-based discrimination. Since "pregnant

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96 Reed, 404 U.S. at 75.
97 See supra note 94.
98 Id.
99 Feminist theory contends that the tendency in our legal tradition to rank everything expresses a social and cultural need to hierarchize. Recently, some feminist theorists have asserted that even patterns of thought in academic discourse are infused with an “androcratic” (masculine) force. See, e.g., Riane Eisler, The Chalice and the Blade 104-06 (1987) (arguing that the ways in which theorists of any kind, including legal scholars, look at “difference” is largely the product of two models of analysis for understanding human diversity. “Androcracy” elevates “male” characteristics and values such as competition, aggression, and power, while “gynacy” values “female” values like caring, sharing, relationships, and peace).

Our own dominant value system appears to fit the masculinized paradigm of domination. This androcratic system values competition, hierarchy, and ranking in virtually all aspects of how we look at the world, in our relationships, and in the way we structure our institutions. In contrast, other cultures, including many Native-American cultures, have “gynanic” value systems of peace, relationship, and nurturing.

In this vein, feminist legal theorists have forcefully questioned virtually every angle of masculinized tendencies in legal analysis. See, e.g., Ann C. Scales, The Emergence of Feminist Jurisprudence: An Essay, 95 Yale L.J. 1373 (1986). See also Mary Jane Mossman, Feminism and Legal Method: The Difference It Makes, in At the Boundaries of Law: Feminism and Legal Theory 283-300 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991) [hereinafter At the Boundaries]; Martha Minow, Making All the Difference: Inclusion, Exclusion and American Law 1-11 (1990); Crenshaw, supra note 11, at 167.
101 417 U.S. at 492-97.
and nonpregnant people" had been treated alike by the insurer, there was no harm.\textsuperscript{102}

From a feminist point of view, these and later cases\textsuperscript{103} have reinforced the belief that existing non-discrimination frameworks engender inequality rather than fight it. The feminist agenda to eradicate sexual stereotyping has consistently urged reformulated perspectives in discrimination theory that would focus not just on the irrelevance of sex as a classifying criterion, but would account for the more hidden sources of harmful discrimination.\textsuperscript{104}

Perceptions of difference must be put into a context that elaborates the ways in which even a single stereotype can perpetuate the oppression of a social group, regardless of the political or economic power it may achieve. The Supreme Court, however, has never explored or utilized the tools from which to create a more realistic relationship between concepts like biological sex and gender roles. Lacking this perspective, the Court has tended to reach for standards of equality set by men.

The strength of the feminist critique is that modern constitutional theories of equality do not focus on the unique relationship between biological sex and gender roles. By falsely equating the terms "sex" and "gender," the Court's jurisprudence creates, at best, an ambiguous doctrinal tool; at worst, it erects a barrier to full equality between men and women.\textsuperscript{105} The feminist critique also highlights the dangerous implications of strict reliance on the individual-based model of equality. In the context of a debate hinging on the classic differences between men's and women's reproductive capacity, feminists argue for a model of equality that allows courts to be gender conscious.

This critique has therefore opened the door to the troubling questions raised whenever the traits used to mark someone as part of a social group are also the basis of social, economic, and political power differentials. Resolution of these questions entails an exploration of the unconscious attitudes, or of the history of prejudice, that potentially affect diverse groups falling within presumably fixed categories used to resolve discrimination cases. Neither governing paradigm, traditionally interpreted, promotes such exploration. As long as the paradigms either maintain the rigid expectations of the group-based model, or demand purist interpretations of the individual-based model, men or white people will be able to posture themselves as victims of reverse discrimination.\textsuperscript{106}

A further lesson of the feminist critique of reigning models of equality illustrates that the difference debate rests on a misunderstanding of the


\textsuperscript{104} See supra note 10 and accompanying text.

\textsuperscript{105} Law, supra note 10.

\textsuperscript{106} See supra notes 36-39 and accompanying text.
breadth and subtlety of gendered attitudes in this culture. Some theorists, seeking to uncover buried attitudes about women, propose "gender" as an alternate category of analysis. This category may prove helpful in illustrating the subtle ways in which traditional structures of thought and analysis not only exclude the feminine voice, but also code social behaviors, values, and legal concepts. The gendered analysis suggests the need to discover textured patterns of discrimination in the social fabric, sometimes identified by unconscious assumptions based on traditional gender roles or by blatant stereotypes.

As such, the difference debate provides a context in which to evaluate the impact of gender-based stereotyping. Take, for instance, the Court's ruling that excluding pregnancy under a disability plan represents a rational distinction between "pregnant and nonpregnant" people. By ignoring the more subtle forms of gender-based discrimination, the Court's equality jurisprudence creates false categories such as "intermediate scrutiny" or false relationships between categories, such as man versus woman.

Together, these lessons from the feminist critique of equality theory suggest that we need to evaluate both the strengths and weaknesses of the traditional perspectives. Their strength lies in affirming the constitutional values of freedom from discrimination and respect for individual moral worth. Their weakness derives from outmoded and rigid frameworks of analysis that fail to prevent harms perpetuated against individuals due to a perception that they belong to one or more disdained social groups. Moreover, existing frameworks discourage the exploration of the complex web of discrimination affecting ethnic, sexual, racial, and other groups.

1. Identifying the Complexity of Discrimination

In a critical essay dealing with the problems of discrimination for black women, Kimberlé Crenshaw argues that traditional methods of analysis do not address the problems of black female litigants because these

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108 CAROL GILLIGAN, IN A DIFFERENT VOICE 25 (1982). Gilligan's theory of a "different voice" or "ethic of care" in moral development can be rephrased as the need to recognize that the personal point of view ("moral guilt") is appropriate in making moral decisions, and that greater difficulties arise for the moral actor (or society) when one assumes that all ethical choices can be made by strictly relying on abstract "principles" or criteria of moral adequacy. See Jonathan E. Adler, Moral Development and the Personal Point of View, in WOMEN AND MORAL THEORY 205-28 (Eva Feder Kittay & Diana T. Meyers eds., 1987).

In the legal profession, Gilligan's theory of a different voice has supported the rallying cry that lawyers' ethical problems also need to be placed into the social context of "care." See, e.g., Ellen C. Dubois et al., Conversants, Feminist Discourse, Moral Values, and the Law—A Conversation, 34 BUFF. L. REV. 11 (1983); Carrie Menkel-Meadow, Portia in a Different Voice: Speculations on a Women's Lawyering Process, 1 BERKELEY WOMEN'S L.J. 39 (1983); Naomi R. Cahn, A Preliminary Feminist Critique of Legal Ethics, 4 GEO. J. OF LEGAL ETHICS 23 (1990); Nel Noddings, Ethics from the Standpoint of Women, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, supra note 10, at 160-73.

109 Crenshaw, supra note 11.
methods assume that discrimination fits identifiable sets of categories. Each category carries an identifiable set of assumptions that may come into play against an alleged victim of discrimination.\textsuperscript{110} As Crenshaw notes, white men set the standard against which equality is judged. Consequently, both the definition of discrimination and the analysis it engenders tend to operate under the assumption that a pure case of race discrimination involves black men, and a pure case of sex discrimination involves white women.\textsuperscript{111}

These assumptions leave little room for the thorough analysis of discrimination claims brought by black women, who encounter a set of stereotypes different from those of both black men and white women. The social identity of black women is not simply a composite of “black” and “[white] women.”\textsuperscript{112} Thus, Crenshaw argues, without recognizing the phenomenon of “intersectionality” between categories, courts can never address the unique harms experienced by black women.\textsuperscript{113} Recognition of such intersectionality in cases involving a black female litigant would enable courts to identify and redress situations where discrimination was experienced as a black, as a woman, as a black and a woman, and also as a black woman.\textsuperscript{114}

Crenshaw’s discussion of “intersectionality” is an extremely valuable contribution to the feminist critique of traditional methods of discrimination analysis. However, it fails to address the individual who experiences discrimination on the basis of multiple aspects of her identity. Traditional methods of analysis fail such an individual, and Crenshaw’s theory remedies only those situations where traditionally recognized categories, such as race and sex, intersect in a particular social identity.

Under the governing paradigms, the harm of discrimination is rooted in, and therefore only remedied by, the use of separate categories, such as race, sex, age, or disability. Both the traditional group-based model and the individual-based model demand that a litigant fit her claim into an independent category. Yet neither governing paradigm encourages identification of other factors which diversify any of the traditional categories created under the white male standard of equality. Thus, differences amongst members of a traditionally accepted category, such as race, are entirely ignored. Yet these differences exist and attest to the multiple ways in which an individual may experience discrimination. Various aspects of a person’s identity cannot and should not be separated from each other, whether or not these aspects fit traditional categories of analysis.

As I have shown, Crenshaw acknowledges this to be true in situations where discrimination occurs along intersections of the traditionally recog-

\textsuperscript{110} Id. at 150-52.
\textsuperscript{111} Id. at 140.
\textsuperscript{112} Id. at 140-42.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 149.
nized categories of race and sex. However, her theory does not reach discrimination occurring along intersections of non-traditionally recognized categories, such as homosexuality. The question of sexuality and gender cannot be viewed in the way one traditionally thinks of race or even gender discrimination. For example, in theory the category of race presumes the existence of a social group that includes both men and women. In practice, however, as Crenshaw argues, some race claims need more thorough gendered analyses in order to reduce the discriminatory impact on black women.

Traditionally, the category of sex also receives limited interpretations. Although in theory the category "sex" can apply to men, traditional discrimination theory tends to narrow its meaning only to fit the classic challenge by women of male privilege. This same tendency to give the term "sex," under laws like Title VII, extremely narrow interpretations explains those cases where courts have refused to recognize discrimination against gays as sex-based discrimination, even when the alleged harm stems from gender-role stereotyping.

With a "holistic/irrelevancy" perspective, I intend to question the categorization process in traditional analysis, and to press forward Crenshaw's perspective that some of these categories sometime "intersect" and affect unique social identities.

Discrimination is neither a simple matter of independent categories, with narrow interpretations set by white male standards of equality, nor the simple intersection of traditionally accepted categories. Yet governing paradigms have so powerfully affected the ways in which we identify discrimination that even feminists and other progressive theorists do not see the ways in which personal traits evoke the potential for multiple intersectionality, and that all categories are potentially essentialist.

Because no existing framework recognizes that a victim of discrimination might be not just black, but also, for example, latina, aged, disabled, poor, or lesbian, and because these together may inform a single discriminatory act, we must radically dismantle the arbitrary categorization and analyses induced by traditional frameworks. I therefore want to question that categorization process, explore its implications, and press forward the feminist critique that these categories intersect and affect unique social identities. I will also incorporate the underlying public policy of traditional paradigms of equality into a new "holistic/irrelevancy" model of equality.

D. The Public Policy Underlying Traditional Equality Paradigms

The principle of equality reflects an important public policy in our social, political, and legal culture: guaranteeing freedom from arbitrary prejudice. Traditional frameworks of analysis fail to emphasize this underlying policy of discrimination law. Were this policy emphasized more, the
frameworks of analysis in discrimination law would, by necessity, be different. Instead of using the current approach and its concomitant categorization process, courts would have to acknowledge a social reality in which individual identity transcends narrowly defined labels. This acknowledgment would help litigants not covered by reigning paradigms, such as lesbians and gay men.

Discrimination does not come in neat boxes or categories. The category "race" does not apply to singularly defined men or women, but instead potentially embraces people of various nationalities or various skin colors, and of different sexes. The social identity "Latin American," for example, may encompass Mexicans, Puerto-Ricans, Cubans, Spaniards, and South Americans. Within this single label, then, is a rich diversity of ways in which people identify themselves.

The public policy underlying both the group-based and the individual-regarding models of equality is freedom from arbitrary prejudice. Prejudicial acts, while often taken against individuals, stem from stereotyped beliefs about the social group to which the individual belongs. Stereotypes, as simple and crude mental representations of the world, perpetuate a needed sense of difference between oneself and another.115 Existing discrimination law does not prohibit the stereotyping per se, but the prejudicial act to which it gives rise.

Presumably, stopping bigoted behavior (through law enforcement) is an appropriate social goal in and of itself, and contributes to the governmental task of maintaining social order and reducing conflict. Prejudice harms more than the individual or group member against whom it is directed. It damages all of society by drawing into question the ability of an orderly society to foster respect and fairness through the rule of law. The rule of law can foster the intentional repression of a social group when, for example, legislatures and courts are aware of and ignore the fact that certain laws may encourage violent prejudicial acts. One illustration is the connection between sodomy statutes and gay bashing. Here, the rule of law and the principle of equality have simply collapsed as the foundation for any social or constitutional order.

None of the various articulations of the equality principle sufficiently emphasize the fact that all of society (including the usual non-victim white male) benefits from the principled struggle against prejudice and the bias-related violence it engenders. Contemporary equality rhetoric emphasizes an upside-down approach; instead of focusing on the nature of the harm—prejudice—as unworthy of a free democracy, it limits the diversity of people and situations calling for scrutiny by assuming that the contours of the original paradigm control future cases. Thus, this rhetoric focuses on the

attainment of fair political processes as the key to justice, equality, and social order. Remedies are granted to those who deserve judicial protection because they have met paradigmatic conditions such as membership in a discrete and insular group. As noted above, if one does not fit the criteria, then there is no claim, there is no harm, there is no remedy, and the social patterns of inequity continue.

Even though the group-based model provides a special judicial sensitivity—heightened scrutiny—traditional perspectives of the model discourage that scrutiny unless a claimant is a member of a discrete and insular minority.\(^6\) The underlying premises of the discrete and insular model have shaped traditional discrimination theory. A typical inquiry asks whether you are the member of a protected group, rather than whether you have suffered prejudice because of a trait that is irrelevant to your moral worth.

Traditional models of equality suggest that the only basis for invoking heightened scrutiny is finding some fixed, immutable trait that identifies the social group.\(^7\) As numerous scholars have argued, these models, especially as applied to gay people, are inherently flawed.\(^8\) Framing the question in this way emphasizes the historical origins of the discrete and insular minority model over the purposes of invoking special judicial scrutiny. Yet, whether one does or does not invoke the concept of discrete and insular minorities, the aim of the model—challenging acts of prejudice—remains the same. Recognizing this aim opens the door to identifying the sources of the prejudice. Using the law to fight prejudice entails invoking the strength of ideals, ideals based on notions of equality. Although equality is an elusive concept, its invocation in turn evokes the strengths of the two governing paradigms described above. Discrimination claims must be grounded in the conviction that the government cannot legitimately pass or maintain laws known to license irrational acts of violence, hatred, and prejudice. They must also recognize that discrimination is not easily broken down into neat categories born out of the interests and power of white men.

Current equality rhetoric and methodology would benefit from a return to the fundamental public policies underlying the two reigning paradigms. Historic\(^9\) or philosophical\(^10\) justifications of conventional tools, such as the suspect class model, should not prevent the reexamination of their role in equality theory and antidiscrimination law. We must ask: Does this methodology fulfill its intended goals? Is this how we want to think about

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\(^{117}\) Hailey, supra note 2; Arriola, supra note 2.

\(^{118}\) See supra notes 49-51 and accompanying text.

\(^{119}\) See supra note 22 and accompanying text.

the meaning of equality? Concepts like immutability served the important historical purpose of demonstrating that prejudice against individuals based on traits irrelevant to their basic worth is illegal. Significantly, though, the Supreme Court has never limited the meaning of discrete and insular to those groups who share an immutable trait. Instead, it cautioned against prejudice towards individuals for whom the immutability concept is irrelevant, such as the members of religious sects or cults. Immutability, then, cannot be used to identify the groups who merit heightened scrutiny. Thus, even if it were true that homosexuality is a mutable trait, this would not justify the Court's refusal to use heightened scrutiny in examining laws which categorize on the basis of homosexuality, and foster disrespect, violence, and unfair discrimination against lesbians and gay men.

Equality under the law contains other unarticulated premises which discrimination analysis must integrate. First, prejudice undermines a basic founding principle of our democratic government: tolerance of diversity. Second, interpretations of equality must be guided by an awareness of the role played by the law in mediating conflicts that arise from differences between people. Currently our courts neither integrate these premises nor promote their underlying public policy. These failures add to the continuing patterns of inequality reinforced by unequal power relationships between social groups.

III. A FEMINIST CRITIQUE OF LESBIAN LEGAL THEORY

As an outgrowth of the lesbian-feminist movement, lesbian separatism is both a concept and a way of life. Lesbian separatism grew as a reaction to the experience of lesbian feminists who were frustrated by the heterosexist leadership of the mainstream feminist movement. This separatism is the basis of lesbian legal theory which rejects the heterosexism implicit in the traditional "rule of law," and the methodology it engenders, as equivalent to rule by men. Lesbian legal theory validates a minority experience that is completely obscured by traditional analyses—that of lesbian litigants who do not fit the arbitrary categories that courts use to render justice. They assert "lesbian-centeredness" and "lesbians-only legal theory" as a remedy to this problem.

121 See supra note 35.
122 See Bakke 438 U.S. at 290 (1977) (Powell, J.) ("Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious.").
124 ROBSON, supra note 5, at 11.
125 Id. at 47-57.
Lesbian legal theory attempts to eliminate existing constitutional and legal categories created in the tradition of "rule by men." This includes eliminating all feminist arguments which link lesbianism and sexual orientation discrimination to the concept of "gender." According to lesbian legal theory, this link subordinates lesbianism to feminism and women (lesbians) to men (gay men). Lesbian legal theorists critique feminists for relying on established notions of "equality," "justice," or "fairness" which draw on the traditional system of rule by law and ultimately merely perpetuate male values. Arguably, however, rule by men has also affected lesbian culture. It too may define, perpetuate, and protect itself with male-created concepts which inherently deny women's worth as people.

A. The Problems of Categorization

Lesbian legal theory's critique of the traditional system of rule by law and its arbitrary categorization process is well founded. It is also true that the rule of law, as well as its enforcement and interpretation, have generally been "all male." There remains, however, a troubling aspect to lesbian legal theory: it propounds a legal and political agenda hampered by the pitfalls of traditional analysis and creates an oppositional relationship between lesbian legal theory and feminist legal theory.

Feminist legal theory, which challenges the stereotypes that keep women oppressed, is not inconsistent with the struggle for lesbian rights. Lesbian legal theory is thus disconcerting, for it is based on a narrow, essentialist view which ignores the diversity of female experience. By negating this diversity, lesbian legal theory reinforces the arbitrary categorization that grounds the governing paradigms. Women are oppressed in many ways, and sexuality is only one of them.

The multifaceted nature of lesbian existence, transculturally and historically, suggests the conceptual possibility of theorizing strictly for gay women. Nonetheless, the category "lesbian" cannot entirely address the many variations of harm experienced under patriarchal/sexist values. The category of "lesbian" cannot exist without "woman," or the latter without "man." These reflect the historical and universal tendency to categorize human experience and people. Lesbian legal theorists must reconsider their basis for criticizing traditional legal theory, namely its labels and elusive categories. At the same time, they must avoid the tendency to essentialize the group for whom they seek justice.

127 ROBSON, supra note 5, at 21-22.
128 Id. at 20-21.
129 Id.
130 See supra part I.
131 A more complex historical picture about the role of women in lawmaking and politics undermines this latter argument. D'EMILO & FREEDMAN, supra note 2, at 27-28.
132 ROBSON, supra note 5, at 21-23; see also note 12 and accompanying text.
Giving voice to minority perspectives is a valid, yet delicate and possibly dangerous endeavor. In the context of lesbian-based discrimination, my approach rejects focusing on singular traits and discourages further arbitrary categorization, such as dichotomizing "woman" and "lesbian." This approach, grounded on the principle that heterosexist gender ideology induces all forms of sexual stereotyping (with unique variations in certain cultures) is decidedly feminist.

Feminist legal theory must address differences amongst women's sexual identities as it must address differences in, for example, class, race, age, ethnicity, disability, and religion. In the same way that courts engender circularity with a difference debate which assumes women are inherently different from men, it would be useless, and possibly dangerous, to argue for an essential lesbian voice on the grounds that lesbians are fundamentally different from other women. An integrated feminist legal theory of equality can support traditional concepts of fairness and justice and yet find new methods of analysis that will not ignore the radical diversity of our society. Put another way, the feminist approach to equality must recognize, rather than canonize, difference. Canonizing difference on any level is analogous to using "the master's tools"—such as paradigms which emphasize ranking of claims and the splintering of a person's whole identity into arbitrary categories—to "dismantle the master's house." Attempts by legal theorists to dismantle patriarchal society and to modify its values must avoid adopting a rhetoric which perpetuates those same values. To that end, the feminist objective is to eliminate not only women's oppression, but

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133 See Fajer, supra note 16; Scott, Deconstructing Equality, supra note 10, at 143-44.
134 I find myself in a predicament with these statements. While I see much categorization in legal theory as not wholly meaningful, given that the constructs we devise and their meanings usually complement contemporary social, political, and economic circumstances, I do not see all categories as meaningless. Some categories are useful guideposts for legal theory and analysis. This usefulness enables theorists like Ruthann Robson to suggest a "lesbians-only" legal theory. Given that "lesbian" is a subset of the category "woman," and in the language of social construction the latter is also a totally invented category of human existence fixed upon the biological "female" sex, then a theory for lesbians is as good as a "feminist" theory for women. Of course, for all of this to work, one would have to agree that: (1) there is a primary meaning to the term "lesbian" that has no relevance to women; and, (2) that heterosexism is totally irrelevant to lesbian oppression. On this point, I strongly disagree. Cf. Sara Lucia Hoagland, Why Lesbian Ethics?, 7 Hypatia 195 (1992).

Moreover, the experience of "lesbian" oppression may fall upon those who see themselves as lesbians, and those who do not, i.e., those who by circumstance find themselves "lesbian-baited" and discriminated against because they threaten male heterosexist power. See, e.g., Michelle M. Benecke & Kristin S. Dodge, Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals, 13 Harv. Women's L.J. 215 (1990) (arguing that heterosexual women do not escape lesbian-based discrimination when they challenge sexual harassment by male colleagues and/or enter traditionally male dominated fields of employment). Thus, by returning to the sources of oppression, one is left with the fact that the lesbian identity is less important to the reasons for recognizing lesbian oppression than it is for the oppression and/or its source: heterosexism and the unbridled power of men over women.

136 Audre Lorde, The Master's Tools Will Never Dismantle the Master's House, in This Bridge Called My Back 98, 99-100 (Cherrie Moraga & Gloria Anzaldua eds., 1983).
all value systems which legitimate ranking or competition and oppression and which reinforce arbitrary categorization.

B. Homophobia is a Feminist Issue

In an attempt to solve the problem of lesbian invisibility, lesbian legal theory divorces lesbians from their identity as women, as well as from other aspects of their identity. This identity-split must be healed by a perspective which acknowledges anti-lesbianism as a feminist issue. Similarly, the feminist agenda is incomplete without a recognition of the lesbian connection. From this perspective, anti-lesbianism stems from both misogyny and patriarchal sexist values.

A feminist theory which includes a critique of anti-lesbianism applies to any lawsuit involving lesbians. For example, lesbians seeking custody of their children challenge traditional concepts of motherhood. Because lesbians do not fit this traditional concept, they are often deemed unfit mothers. Thus, fathers can use anti-lesbianism to challenge lesbian mothers’ right to custody. Moreover, the mother must somehow prove that her child will not be harmed by growing up in a non-heterosexual environment.

This reformulated feminist perspective also applies to women in the military, regardless of sexual orientation, who face the threat of sexual harassment in the form of lesbian-baiting. Any woman identified as a lesbian can lose her entire career. Female soldiers clearly defy the stereotyped cultural image of strong, brawny, and brave military men. Not surprisingly, male soldiers often resent women among them. Thus, they engage in lesbian-baiting. The military’s homophobic sexism, then, is not only a lesbian issue, but is also another example of the ways in which patriarchy oppresses women.

These situations illustrate a common feminist concern for freeing women from male dominance and patriarchal control. Characterizing these situations as either “lesbian” or “feminist” becomes meaningless. In each case, the alleged harm is rooted in a common set of cultural attitudes about women. Ultimately, the law reinforces gendered concepts—that a “good mother” is a dependent, heterosexual woman, and a “good soldier” is a heterosexual man—and keeps both men and women in their socially approved place.

The appearance of lesbian legal theory teaches us that the law’s treatment of homosexuality and sexual identity is deeply flawed by a stubborn adherence to narrow interpretations of “gender.” Just as early sex-based discrimination cases failed to link gender and sex (within the meaning of

137 Rich, supra note 59.
138 Supra note 53.
139 See supra notes 94-110 and accompanying text.
140 See Benecke & Dodge, supra note 134, at 234-35.
reproduction and pregnancy), so too cases involving sexual orientation-based discrimination fail to link gender and sexual orientation. By refusing to recognize that discrimination on the basis of sexual orientation is a gender issue, courts can deny basic civil rights to gays and lesbians. In contrast, a broader understanding of gender as a category of legal analysis—one which encompasses gendered notions of sexual identity—would allow courts to address claims of anti-homosexual discrimination. This type of approach would reveal the ways in which our culture arranges relationships between "male" and "female" people, particularly in the area of sexual behavior. Heterosexist norms, thus, perpetuate this social construction of gender.

In the post-Bowers era, lesbian and gay theorists have sought to recharacterize anti-gay prejudice as discrimination based on identity in addition to conduct. Some of these theorists argue that homosexual oppression reflects changing attitudes throughout history about homosexual conduct. However, the conduct-only perspective, which grounds the claim that sodomy laws violate one's right to privacy, proved fatal in Bowers. This perspective encourages an obsession with discovering the biological origins of and cures to homosexuality.

Other theorists and historians, in contrast, place the issue of sexual conduct in the context of the historical evolution of American attitudes about sex. This historical view of homosexual identity posits that while homosexual conduct has occurred throughout time, a homosexual identity and a subsequent culture emerged from a specific set of social, political,

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141 See supra notes 2 and 4.
142 JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY 42-46 (1980).
143 Social theorist Jeffrey Weeks offers one of the most challenging views of the legitimacy of sexology and the persistent belief that the nature/nurture debate is a valid inquiry in the "science of desire." Alternatively, one might view these investigations as arising from changing social attitudes about sex and reproduction, fluctuating along with shifting political and economic patterns. "Sexology," and the concepts and investigations attached to it (e.g., trying to find the genetic origins of "homosexual deviance"), are really collapsible under the rubric "technology of control." Nonetheless, Weeks argues, the genetic inquiry is powerful and alluring. Weeks believes its appeal lies in helping people reassure themselves they are "normal." Also, its overwhelming scope produces facile explanations for every human experience we know of and begrudgingly accept as unpredictable—everything from aggression and violence to the innate desire to be good. The claim of "nature" in the sexual context, then, becomes both the truth of our being, and a "corridor of mirrors," making the subject of "modern sexuality" a hotly contested, exploited body of knowledge. The end result is a topic ("human sexual nature") that is complex, noble, murky, and historic, making virtually anything we "know" about it practically irrelevant to nature at all. See Weeks, supra note 5, at 61-63.

See also Carol S. Vance, Gender Systems, Ideology and Sex Research, in POWERS OF DESIRE, supra note 59, at 371 (arguing that contemporary sex researchers and educators are so concerned with sexual liberalism that they ignore how ahistoric and mythical cultural attitudes influence their own models of sexological research and perpetuate such questionable beliefs as the theory of natural selection, heterosexual "normalcy," homosexual "deviance," male aggression, female passivity, gay male promiscuity, and lesbian passionlessness); cf. Mildred Dickemann, Reproductive Strategies and Gender Construction: An Evolutionary View of Homosexualities, 24 J. HOMOSEXUALITY 55 (1993) (genetic theories about the various reasons for and styles of homosexuality are biologically indefensible and historically inadequate; instead, homosexual behavior is merely one means of managing reproduction).
and economic circumstances. Thus, a conscious social, political, and cultural “gay identity” arose out of a historical moment when individuals came together around their (homo)sexual orientation.\textsuperscript{144} This historical basis for the emergence of gay consciousness grounds claims that gays, lesbians, and bisexuals experience illegal discrimination on the basis of their sexual identity because they are oppressed by a heterosexually supremacist culture.\textsuperscript{145}

The argument that the Equal Protection Clause encompasses sexual identity relies on analogizing gays and lesbians to other minority groups. However, as previously noted, unless traditional analysis becomes more flexible, most courts will reject this argument on the grounds that gay people cannot be identified as a minority insofar as sexual identity is a matter of choice or preference.\textsuperscript{146} In addition, any attempt to refute the assertion that sexual identity is a choice or preference must necessarily be based on unreliable “scientific” claims that homosexuality is biologically based.\textsuperscript{147} This conduct/identity tension, then, tempts advocates for gays and lesbians to buy into the heterosexist obsession with discovering the biological origins of homosexuality.

In view of these limitations, theorists have begun to explore a broader, more subtle argument linking anti-homosexual discrimination with cultural and historical views of sex and gender roles. For example, a recent article by Professor Marc Fajer challenges the gendered stereotypes that account for much anti-gay discrimination.\textsuperscript{148} In fact, many stereotypes of lesbians as pseudo-men or gay men as weak and effeminate stem from the imposition of 19th century notions about sex, romance, and sexual behavior. The separate spheres ideology of that era parallels continuing societal beliefs that “biology is destiny,” and men and women are inherently different and unable to share any physical, emotional, and psychological traits.\textsuperscript{149}

As a feminist, I reject the idea of inherent, biological differences between men and women. Homophobia is a feminist issue because lesbians and gay men are discriminated against for freeing themselves from rigid masculine and feminine gender roles. As cultural theorist Warren Blumenfeld has argued, society relies on homophobia in order to confine men and

\begin{itemize}
\item \textsuperscript{144} John D’Emilio, \textit{Capitalism and Gay Identity}, in \textit{POWERS OF DESIRE}, supra note 59, at 100-13; see also \textit{WEEKS}, supra note 5, at 185-95.
\item \textsuperscript{145} Arriola, supra note 2.
\item \textsuperscript{146} See supra note 49 and accompanying text.
\item \textsuperscript{147} See supra note 143.
\item \textsuperscript{148} Fajer, supra note 6; see also Elvia R. Arriola, \textit{Coming Out and Coming to Terms with Sexual Identity}, 68 Tul. L. Rev. 238 (1993) (book review).
\end{itemize}
women within "gender envelopes." Failure to properly perform socially constructed gender roles, for example, causes women to be labeled as "mannish" or men as "effeminate." These labels are one example of what I call "cultural homophobia," which is not only a fear of being identified with homosexuality, but also a belief that to be gay or lesbian means the loss of one's socially constructed gender identity.

Cultural homophobia is an effective tool for silencing women and keeps them from questioning their devalued social and economic status. Identifying oneself as a feminist leaves one vulnerable to lesbian-bating. Thus, many women reject the identity of feminist for fear of being labeled at best "mannish," or at worst "lesbian." Cultural homophobia locks people into gender-based roles that inhibit their natural creativity and self-expression. Attempts to break out of these gender-based roles underlie cases like Price Waterhouse and Rabidue v. Osceola Refining Co. In Rabidue, the company's first female manager, voicing her opposition to sexual harassment, was portrayed as an "irascible" individual who did not fit in. In Price Waterhouse, a female employee was advised to wear makeup and perfume, flirt with colleagues, be nice to clients, and walk and talk "like a lady." At the same time, she had to be as tough as "the guys" or face the "glass ceiling." Men who step out of gendered roles also pay a price. Men are not supposed to have lilting voices or wear earrings. If they do, they may face employment discrimination similar to that experienced by women who do not conform to gendered roles. Men are also socialized not to show their feelings or display affection toward each other. As Fajer writes, real men do not "eat quiche [or cry] together."

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151 In March 1992, I spoke at a symposium on women and violence sponsored by the Texas Journal of Women and the Law and articulated this view in my concluding remarks. My view that "feminism" had become a dirty word was based on numerous comments made in the past few years by young women, some as my students or social acquaintances, which reflected a deep confusion about what it means to be a "feminist." I knew that my comment before the 150-plus audience of mostly women would evoke a response. I was not surprised, then, when a young woman stood up and stated that she attended this conference to learn how she could work on women's issues, but she was not a "feminist" and did not need that label to feel empowered. This social change in attitudes proves the fragility of our cultural memories. Young women forget that they are empowered to speak up, to participate, and to get an education in nontraditional fields only because the feminist movement worked to eliminate barriers that those young women no longer face. I have since concluded that Susan Faludi is right: we have been brainwashed again. See generally SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST FEMINISM (1991).


154 Price Waterhouse, 490 U.S. at 235.

155 De Santis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979).

156 See generally Fajer, supra note 6; see also Cooper Thompson, On Being Heterosexual in a Homophobic World, in HOMOPHOBIA, supra note 150, at 235-48 (arguing that homophobia does not "oppress" heterosexuals but does hurt them, and that all men, gay and non-gay, must adjust their public behavior or potentially find themselves physically attacked for stepping out of "proper" gender roles).
Thus, it is clear that anti-gay prejudice both results from and perpetuates gendered roles. The social and historical processes that created the homosexual identity and legitimized homophobia continue to sustain a gender ideology with specific values and beliefs about appropriate sexual behaviors. Consequently, lesbians and gays can and should characterize their claims as sex-based discrimination.

IV. Constructing a Holistic/Irrelevancy Model of Equality

Governing paradigms encourage legal analysts to make a number of problematic assumptions. First, the various characteristics of one’s identity, such as sexual orientation, gender, and race, are always disconnected. Second, these characteristics carry fixed and clear meanings. Third, the various aspects of one’s identity may be ranked so that, for example, race may be prioritized over gender. Fourth, some characteristics, such as class, do not provide a relevant basis for discrimination claims. Finally, these paradigms create false dichotomies and false power relationships and promote limited visions of equality. They obscure whether or how discrimination occurs, what remedy to use, or why conflict has arisen.

Under a “holistic/irrelevancy” model, courts would recognize that a person’s identity is rarely limited to a singular characteristic. Instead, identity represents the confluence of an infinite number of factors. Those factors can include race, religion, sexual orientation, nationality, ethnicity, age, class, ideology, and profession. The factors that comprise an individual identity constantly shift, some becoming more prominent in certain settings than others. I arrive at this conclusion through an understanding that no single trait defines my own identity. Rather, my being Mexican, Catholic, a woman who is lesbian-identified, a feminist lawyer, professor, and yogin, are all important aspects of my identity.

157 Cultural homophobia thus discourages social behavior that appears to threaten the stability of heterosexual gender roles. These dual normative standards of social and sexual behavior construct the image of a gay man as abnormal because he deviates from the masculine gender role by subjecting himself in the sexual act to another man. Gay male relationships further threaten existing gender roles because they replace the traditional dynamics of competition and aggression between men with such attributes as love, sharing, compassion, and intimacy. See Stoltenberg, supra note 60; see also Diane Elze, It Has Nothing To Do With Me, in HOMOPHOBIA, supra note 150, at 95-113.

158 In our culture anything can become the source of differentiation between individuals, giving rise to their placement in arbitrary social groups (e.g., diet, hair color, weight, intelligence, education, college, what kind of degree, having a car, driving one, or driving motorcycles, trucks, etc.). The law plays a minimal role in addressing the range of biases by regulating only that kind of discrimination recognized as most unfair and disadvantageous. Sometimes the alleged source of discriminatory animus falls within other broadly defined categories. See, e.g., Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976) (weight restrictions imposed on women but not on men).
A. Addressing Categorization

Although numerous factors comprise an individual identity, others may identify that individual on the basis of a single trait. The trait which becomes prominent, or even legally relevant, is seldom predictable. While a single trait may become prominent and legally relevant, discrimination in fact stems from stereotypes about a person’s entire identity. Thus, models that fail to acknowledge that people move in and out of communities and that categories never match reality, cannot adequately reveal how multiple unconscious attitudes motivate acts of discrimination.

My holistic/irrelevancy model rejects both the individual’s and the law’s tendency to choose their own preferred and accepted categories or to see them as necessarily separate and unrelated. Courts should acknowledge the multiple forms of oppression that are often facilitated by stereotypes of various social identities. This would reveal the complexity of social identities currently rendered invisible under traditional frameworks. At the same time it would avoid the categorization promoted and perpetuated by other responses to this invisibility, such as lesbian legal theory. With this end in mind, I encourage the reader to consider the following hypotheticals which illustrate the complexity of personal identities and discrimination.

Suppose, for example, that an employer pays all women the same wage. However, he places white women in the front office jobs because the clientele is mostly white, and he relegates blacks and hispanics to the back room. Meanwhile, he sexually harasses the white women. Would a black woman denied a front office job have any right to challenge the employer on the basis of racism, or sexism, or both? What about a white woman? Is one issue more important than the other?

In another hypothetical, an Asian employer prefers to hire hispanics and Asians over blacks or whites. How do we assess this kind of preferential treatment when our standard paradigms of analysis usually see whites as oppressors and all minorities as victims? Is this a case of the so-called problem of reverse discrimination? What about when an employer hires Mexican nationals over Mexican-Americans because the latter are more likely to question working conditions and wages?

Finally, suppose that a white male employer fires a black lesbian after she rebuffs his sexual advances. Is this discrimination on the basis of race, gender, or sexual identity, or some combination of the three? The following discussion of my holistic/irrelevancy model focuses on this last hypothetical in order to highlight the model’s particular relevance to lesbian and gay litigants.

B. In Search of More Realistic Analyses

Claims of discrimination brought by lesbians of color face two obstacles under current discrimination analysis. First, the categories of race and
gender may be viewed as distinct and separate. Second, the category of sexual identity is not even recognized as a basis of legally remediable discrimination. Faced with a claim by a woman of color, a court could determine that although the categories of race and sex apply, these categories have not been shown to bear any clear relationship to each other. This type of determination was made in *Munford v. James T. Barnes, Inc.*, a case involving a black woman whose white male supervisor demanded that she have sex with him. She repeatedly refused. The sexual harassment carried racial overtones. Limited by conventional legal reasoning, the court in *Munford* failed to see the intersectionality of racism and sexism presented in this case. It held instead that the race discrimination claim was “far removed” from the sexual harassment claim.

For a lesbian of color, the same methodology that fails to recognize a claim of racialized sexual harassment, or gendered racial harassment, also denies her claims of homophobic sexism. The firing of a black lesbian, as illustrated in the hypothetical above, presents a complex picture of identity and discrimination. Yet, the source of the problem is not complex; it is simple, though subtle—she is being fired because she has defied white male supremacy, and is a victim of anti-lesbian sexism.

The holistic/irrelevancy model recognizes the role of unconscious attitudes and the ways that interrelated factors create unique, compounded patterns of discrimination and affect special social identities. In doing so, it rejects the idea of arbitrarily separating out categories to address discrimination in our society. Instead, this model understands discrimination as a problem that arises when multiple traits and the stereotypes constructed around them converge in a specific harmful act. Traditional categories then become points of departure for a deeper, more subtle analysis that explores the historical relationships between certain social groups, as well as an individual’s experience within each of these groups.

This model is holistic because it looks to the whole harm, the total identity. It is an irrelevancy perspective because it assumes that one trait or several traits operating together create unfair and irrelevant bases of treatment. Thus, under a holistic/irrelevancy model, the theory and practice of non-discrimination law become tools for mediating social conflict by challenging the power of deeply ingrained cultural attitudes that perpetuate cycles of oppression for certain social groups.

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159 See supra notes 109-14.
161 A brief description of the facts is set forth in the district court’s decision. 441 F. Supp. at 460. A more complete and more compelling discussion based on the court transcripts is contained in *MacKinnon, Sexual Harassment*, supra note 6, at 73-74.
162 441 F. Supp. at 466-67.
163 As far as I know this is a new term. It simply incorporates the ideas of other theorists and scholars who argue that anti-homosexuality rests on gender-role stereotyping. See Fajer, *supra* note 6, at 617; Stoltenberg, *supra* note 60.
V. Conclusion

This article identifies the ways in which contemporary legal culture addresses problems of discrimination and prejudice and asserts that current models of analysis deny the multi-faceted identity of all individuals. Two governing paradigms of equality theory—the group-based or “discrete and insular model” and the individual-regarding or “irrelevancy model”—inaccurately reflect the social reality of litigants pressing discrimination claims. These paradigms encourage legal theorists to approach discrimination through arbitrary and narrow categories within which a claimant must fit her identity or experience.

Such paradigms give rise to equally narrow theoretical responses by social groups who legitimately complain that the governing paradigms fail to address their legal needs. In particular, lesbian legal theory emerges from, and perpetuates, governing perspectives of equality theory. These perspectives create arbitrary categories for individuals, demand that the categories be treated separately, and even rank them in relation to each other. Drawing from the feminist critique of the courts’ narrow interpretations of “gender” in sex-based discrimination cases, I argue that lesbian legal theory also ignores the interrelatedness of gender and sexual identity. Thus, it fails to recognize that homophobia is a feminist issue.

The politics of identity, whether sexual or racial, has influenced late 20th century thought and behavior. This influence can be seen in the growth of lesbian legal theory. I reject this theory because it defines a woman on the basis of one single aspect of her identity. I view this as a laudable, yet unworkable, theory insofar as it perpetuates the arbitrary categorization critiqued in this article.

We need new models which acknowledge the reality of identity and personhood, notwithstanding the fact that an individual may not fit rigid, dichotomized categories such as “masculine” or “feminine.” The governing paradigms encourage the courts to ignore social reality and to refuse to extend existing and relevant legal protections to lesbians and gays. Courts have refused to extend these protections to lesbian and gay litigants because anti-gay discrimination merges questions of conduct with identity. The courts’ refusal reflects the legal culture’s insistence that discrimination occurs within distinct and separate categories. This categorization denies the complexity of individual identity, thereby preventing society from embracing the richness of its cultural diversity.

Discrimination harms not only the individual but society as a whole. I thus conclude with the hope that this article, and my “holistic/irrelevancy” model—which incorporates feminist critiques of the governing paradigms while pushing those critiques into areas they do not contemplate—will fos-

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164 Ruth Colker, Feminism, Sexuality and Authenticity, in At the Boundaries, supra note 99, at 135-47.
ter a discourse on equality that is inclusive. Equality theorists should recog-
nize the public policy underlying existing paradigms: respect for one's total
identity. This public policy demands respect for traits such as gender, sexu-
ality, race, class, age, and ethnicity. Each trait is important to one's moral
worth, yet none provides justification for the denial of equal rights under
the law.